Supreme Court, U.S.
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85-179

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CALIFORNIA ENERGY RESOURCES CONSERVATION and DEVELOPMENT COMMISSION,

Petitioner,

vs.

BONNEVILLE POWER ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

WILLIAM M. CHAMBERLAIN
General Counsel
California Energy Commission
1516 Ninth Street MS-14
Sacramento, California 95814
Telephone: (916) 324-3237
Attorney for Petitioner

QUESTIONS PRESENTED

1. Where Congress has expressly provided detailed procedures for adoption and modification of rates charged by the Bonneville Power Administration (BPA), may BPA contractually change the rate it has established without complying with any of the ratemaking procedures prescribed by Congress?

2. Where the Ninth Circuit Court of Appeals determines that BPA has modified a rate by contract without complying with the ratemaking procedures prescribed by Congress, may the court nonetheless excuse BPA's failure to follow Congress's mandate and uphold BPA's action because the court believes there were "unusual circumstances?"

PARTIES

The Petitioner in this proceeding is the California State Energy Resources Conservation and Development Commission, a state regulatory agency. Respondent in this proceeding is the Bonneville Power Administration, a federal power marketing agency.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *California Energy Resources Conservation and Development Commission* v. *Bonneville Power Administation,* 754 F.2d 1470 (9th Cir. March 4, 1985). The dissenting opinion of Judge Norris (754 F.2d at 1475) refers, for its substance, to his dissenting opinion in the companion case of *Portland General Electric Co.* v.

Johnson, 754 F.2d 1475, 1484 (9th Cir. March 4, 1985). Both opinions are contained in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 4, 1985. Petitioner's petition for rehearing was timely filed on March 18, 1985. The order denying the petition for rehearing was filed May 2, 1985.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

United States Constitution, Article I, Section 1:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

16 U.S.C. § 839e(i):

> (i) In establishing rates under this section, the Administrator [of BPA] shall use the following procedures:
>
> (1) Notice of the proposed rates shall be published in the Federal Register with a statement of the justification and reasons supporting such rates. Such notice shall include a date for a hearing in accordance with paragraph (2) of this subsection.
>
> (2) One or more hearings shall be conducted as expeditiously as practicable by a hearing officer to

develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data, questions, and argument related to such proposed rates. In any such hearing—

(A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and

(B) the hearing officer, in his discretion, shall allow a reasonable opportunity for cross-examination, which, as determined by the hearing officer, is not dilatory, in order to develop information and material relevant to any such proposed rate.

(3) In addition to the opportunity to submit oral and written material at the hearings, any written views, data, questions, and arguments submitted by persons prior to, or before the close of hearings shall be made a part of the administrative record.

(4) After such hearing, the Administrator may propose revised rates, publish such proposed rates in the Federal Register, and conduct additional hearings in accordance with this subsection.

(5) The Administrator shall make a final decision establishing a rate or rates based on the record which shall include the hearing transcript, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator. The decision shall include a full and complete justification of the final rates pur-

suant to this section.

(6) The final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission pursuant to subsection (a) (2) of this section. The Commission shall have the authority, in accordance with such procedures, if any, as the Commission shall promptly establish and make effective within one year after December 5, 1980, to approve the final rate submitted by the Administrator on an interim basis, pending the Commission's final decision in accordance with such subsection. Pending the establishment of such procedures by the Commission, if such procedures are required, the Secretary is authorized to approve such interim rates during such one-year period in accordance with the applicable procedures followed by the Secretary prior to December 5, 1980. Such interim rates, at the discretion of the Secretary, shall continue in effect until July 1, 1982.

STATEMENT OF THE CASE

A. *Introduction*

Bonneville Power Administration (BPA) is a federal power marketing agency which markets power from federally-owned electricity generation facilities in the Pacific Northwest. BPA markets its power pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. 2697–2736, 16 U.S.C. §§ 839–839h (1982) (the Regional Act). In the

Regional Act, Congress has established important substantive and procedural guidelines for the design and review of the rates BPA charges for federal power. 16 U.S.C. § 839e(i). These procedures are designed to ensure that BPA conducts its business in accordance with statutory criteria and that BPA's customers have a fair and reasonable opportunity to test the factual basis for the rates BPA proposes to charge them. The question in this case is whether BPA may ignore these mandated procedures if "unusual circumstances" provide BPA reason to assert that following the procedures would result in economic harm.

Among BPA's customers are several California utilities, regulated under California law by the California Energy Resources Conservation and Development Commission (CEC). The CEC is a state agency responsible for developing and implementing energy policy for the State of California. Cal. Pub. Res. Code §§ 25000 et seq. In recent years, California has received a substantial fraction of its total electricity needs from BPA and other sellers of electricity that is surplus to the needs of the Northwest. For environmental and economic reasons, the CEC has generally favored this arrangement and has sought to improve it to the benefit of both California and Northwest ratepayers. Since BPA's rates have a substantial impact on the amount California ratepayers pay for this surplus Northwest energy and on the viability of proposals to increase the ability of California to obtain surplus energy from the Northwest (i.e. transmission line upgrades), the CEC has been an active party in

BPA rate proceedings held pursuant to 16 U.S.C. § 839e (i).

B. *Factual Background*

The facts in this case, described succintly in the Ninth Circuit majority opinion (754 F.2d at 1472), are essentially not in dispute. In 1982 BPA conducted a rate proceeding to establish rates for the period from September 1, 1982 to October 31, 1983. Among the rates was a "spill rate" for sale of non-firm energy during periods when high flow in Northwest rivers would cause energy to be wasted ("spilled" over dams or run past unloaded turbines without generating electricity) if the energy were not generated and sold immediately. The purpose of the spill rate was to ensure that BPA could market its surplus energy to replace energy from thermal generation facilities in the Northwest during the spring runoff. The rate therefore had to be lower than the variable or operating costs of most, if not all, of those facilities. BPA established a fixed spill rate of 0.9 cent per kilowatt hour. See Appendix at 17–18.

In early 1983, however, the Spring runoff was so great that BPA had sufficient surplus hydroelectric energy to replace even the energy from the Trojan nuclear power plant which produces energy at an average variable cost of 0.6 cent per kilowatt hour. Since BPA is in partnership with two Northwest investor-owned utilities in the ownership and operation of Trojan, BPA shares both the costs and benefits of operation of Trojan. BPA therefore had a strong incentive to use the surplus hydroelectric

energy that would otherwise be wasted to replace the energy Trojan was producing since that would relieve BPA of its obligation to pay a portion of the operating costs of Trojan. The only obstacle to turning off Trojan during the period in which it was not needed was that the other owners of Trojan had no incentive to do so because BPA's established rate for non-firm spill energy was 0.9 cent per kilowatt hour, well above the savings they would realize in operating costs if they replaced Trojan energy with BPA non-firm energy.

Having not anticipated these circumstances in setting its rates in 1982, BPA had three choices in early 1983. First, it could propose a minor rate change to deal with the problem of shutting down Trojan and conduct a public proceeding pursuant to 16 U.S.C. § 839e(i). Second, it could allow its surplus energy to spill while Trojan continued to operate. Third, it could negotiate a contract in secret to lower its non-firm rate to its utility partners sufficiently that they would agree to shut down Trojan. BPA chose the latter course, negotiating a contract that provided for BPA to pay approximately $13.1 million for "scheduling rights" to the Trojan facility so that it could shut the plant down in exchange for the utility partners' promise to buy a specified amount of non-firm energy (their share of the anticipated output of the plant were it not shut down) at the 0.9 cent per kilowatt hour spill rate, resulting in payments by the utilities to BPA of about $15.5 million for such energy. (Copies of the contracts are included in the appendix to this petition). The net result, of course, was that the

utilities received a substantial discount on the price of this non-firm energy, paying an effective rate of about 0.135 cent per kilowatt hour, less than one sixth of BPA's legally established rate. This discounted rate was not made available to any other purchasers of non-firm energy.

C. *Proceedings Below*

Under 16 U.S.C. § 839f(e)(5) suits to challenge final BPA action, such as the execution of the above described contracts without compliance with ratemaking procedures, must be filed as original actions in the Ninth Circuit Court of Appeals within 90 days of the challenged action. BPA executed the subject contracts on February 8, 1983 and March 8, 1983. Since the contracts had precluded any public comment on the need for or structure of the discounted non-firm rate or on the question whether it should also be offered to other BPA customers, the CEC brought suit on March 11, 1983, seeking a declaration that the contracts were unlawful. In particular, the CEC was concerned that if BPA can contractually modify its rates, whenever BPA asserts that they have become inconvenient, rather than subject a proposed change to the public scrutiny required by 16 U.S.C. § 839e(i), the Congressionally mandated ratemaking procedures designed to give the public a fair opportunity to test the legality and wisdom of BPA's rates could become meaningless.[1]

[1] BPA has not limited the use of contracts to modify rates to the particular circumstances of this case. As the companion case of *Portland General Electric Company* v. *Johnson,* 754 F.2d 1475 (9th Cir. 1985) indicates, BPA also provided discounts in its rates for direct service industrial customers through the use of a con-

BPA argued that by the time briefs were filed the contracts were fully executed and therefore the case was moot. BPA also argued that the CEC had no standing to challenge the contracts. Finally BPA argued that the contracts did not amount to ratemaking because they consisted of two separate and permissible actions: the purchase of "scheduling rights," and the sale of non-firm energy at the established rate.

The Ninth Circuit rejected all three of these arguments. The court agreed with the CEC that the conduct challenged is "capable of repetition yet evading review" and therefore should not be considered moot. 754 F.2d at 1473. The court also recognized that the CEC "as an agency responsible for energy planning in a state that purchases substantial amounts of energy from BPA" has been recognized as a proper party in BPA rate proceedings. *Id.* The court reasoned that "[b]ecause CEC has a legally cognizable interest in participating in BPA's ratemaking procedures, then clearly it must have standing to challenge any alleged departure from those procedures that impinges on its interests." *Id.* Finally the court rejected BPA's transparent attempt to avoid characterization of its action as ratemaking:

> We find BPA's characterization less persuasive because the purchase of scheduling rights was inextricably linked to the sale of energy to PGE and PP & L.

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tract that had the effect of modifying the rate without a ratemaking proceeding. This action, ironically, drew a challenge from one of the beneficiaries of the Trojan contracts who, like the CEC, worried that all opportunity for meaningful public input could be lost through this mechanism.

> The rights to Trojan power were, by themselves, virtually worthless to BPA. Indeed the entire set of transactions was motivated by the circumstance that BPA already had more power than it could sell. BPA does not, and could not, contend that those rights themselves were worth the thirteen million dollars that BPA paid for them. In exchange for BPA's thirteen million dollar payment to PGE and PP & L, BPA obtained PGE and PP & L's commitment to purchase fifteen million dollars worth of energy from BPA. In other words, BPA paid PGE and PP & L to purchase power from it. But paying the buyer to buy is the same thing as reducing the price the buyer must pay. We therefore accept CEC's characterization of the transaction as a sale of energy at a reduced rate that ordinarily would require modification of the rate schedule through the statutory ratemaking procedures.

754 F.2d at 1474.

Having found in favor of the CEC on all of the matters in dispute, the majority then proceeded to rule in favor of BPA on the basis of a novel legal theory that no one argued to the court, either in the briefs or in oral argument: BPA is not required to comply with the statutory ratemaking requirements when there are "unusual circumstances." The court attempted to justify this ruling by noting that the transactions made good economic sense for BPA and by asserting (without the benefit of any evidentiary record to support its conclusion) that "the challenged transactions did not cause any harm to any of BPA's customers, including the California utilities

that are of particular concern to CEC. The transactions affected only two utilities that voluntarily participated in them." 754 F.2d at 1475. Finally, the majority urged that while it cannot guarantee that "unusual circumstances" will not recur, this judge-made exception to Congressional requirements should be a narrow one leaving the statutory ratemaking procedures as "the primary mechanism for modification of BPA's rates." *Id.*

Judge Norris dissented, indicating no disagreement with the court's disposition of BPA's arguments, but taking strong exception to the majority's creation of "an 'unusual circumstances' exception to the absolute statutory command that 'in establishing rates . . . the Administrator shall use the following procedures . . .' 16 U.S.C. 839e(i)." 754 F.2d at 1484. Judge Norris submitted that the unusual circumstances exception "is made out of whole judicial cloth, . . . finds no support either in the statutory language or legislative history . . . [and] confer [s] upon the BPA undefined discretion to bypass the statutory ratemaking procedures whenever it considers it expedient to do so." *Id.* The dissent noted both (1) that Congress has not granted the Ninth Circuit "authority to ratify sales of power by BPA in contravention of the statutory ratemaking procedures on the basis of [the court's] judgment that the sales made good sense under the circumstances" and (2) that even if the court did have that power, it should not exercise it without an evidentiary record that would permit it to probe the factual assertions BPA makes to justify its actions. *Id.* at 1484–85. Finally, Judge Norris concluded that if such an

exception to the statutory rule is indeed warranted, it should be Congress, not the Court of Appeals, that moves to create the exception. *Id.* at 1485.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the majority decision below "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision." Rules of the Supreme Court, Rule 17.1(a). The most powerful arguments in support of this conclusion are, indeed, contained in the dissenting opinion of Judge Norris. It is Congress, and not the Ninth Circuit Court of Appeals, that enjoys the constitutional power to determine when BPA should follow ratemaking procedures and when exceptions should be made.

As Judge Norris pointed out in the final paragraph of his dissent, "Congress has created at least one exception to the ratemaking procedural requirements by giving BPA the flexibility to sell power outside the United States at negotiated rates above rates established in ratemaking procedures for nonfirm power sold domestically. 16 U.S.C. § 839e(1)." 754 F.2d at 1485. Whether BPA should also have an exception to deal with an unexpected large power surplus is an issue arguably subject to reasonable debate, but that debate must occur, if at all, before Congress. Since Congress knows how to make such exceptions when it intends that they exist, the absence of such an exception in the current version of the law means either than Congress does not agree that such

an exception is needed or, at most, that Congress has never considered the desirability of such an exception. By proceeding to enact an exception that even BPA did not argue has any basis in the law, the majority of the Ninth Circuit panel has exercised a degree of judicial activism that is inconsistent with the constitutional principle of the separation of powers.

Where a legislative purpose has been expressed in "plain and unambiguous language . . . the only duty of the courts is to give it effect according to its terms," *United States* v. *Lexington Mill & Elevator Co.,* 232 U.S. 399, 409 (1914); "[w]hen Congress has thus spoken 'in the plainest of words' [citation], we will ordinarily decline to fracture the clear language of a statute, even for the purpose of fashioning from the resulting fragments a rule that 'accords with "common-sense and the public weal." ' [Citation.]" *Andrus* v. *Sierra Club,* 442 U.S. 347, 356 (1979). The courts must be particularly careful not to add implied exceptions to a statute where Congress has spoken directly; where Congress has expressly provided "exceptions to the statute's broad sweep . . . under the maxim *expressio unius est exclusio alterius,* we must presume that these were the only 'hardship cases' Congress intended to exempt." *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 188 (1978).

Moreover, the majority's attempt to suggest that the exception it has created is a limited one is entirely unconvincing. The majority provides no clear guidelines for what future circumstances it would consider sufficiently unusual to warrant another privately negotiated

contractual rate modification. The majority suggests that the fact that the change was voluntarily agreed to by the contracting parties is somehow an important limitation on future application of the exception, 754 F.2d at 1475, but presumably *any* of BPA's customers would voluntarily accept a discount and none of them would contract to have their rates raised. It is the parties who are *not* offered the benefits of such a contract who have the interest in having a public proceeding to allow them to question the propriety of discounts that may result in higher future rates should BPA fail to recover sufficient revenues in the current rate period.

In this regard, the Court should be aware that another panel of the Ninth Circuit Court of Appeals has decided that because BPA is a self-financing agency which must repay all of its debts to the federal treasury, when BPA does experience revenue shortfall, BPA's need to raise revenue justifies anticompetitive actions and policies that would never be tolerated by the Federal Government were they undertaken by any private party. *Department of Water and Power of the City of Los Angeles* v. *Bonneville Power Administration,* 759 F.2d 684, 693 (9th Cir. April 24, 1985). This conclusion, itself, will be challenged in another case before this Court in the future, but the fact that BPA and the Ninth Circuit are in agreement that BPA can do virtually anything it wants to do to cure a revenue shortfall, including even ignoring and violating the basic policies underlying the Nation's anti-trust laws, underscores the importance of statutory procedures for ratemaking as the *only* current

mechanism interested parties have of testing whether rate reductions for other parties are necessary and rational and what the probable impact on other ratepayers will be. Where BPA bypasses these procedures, it prevents parties from taking advantage of the only significant opportunity Congress has provided for testing BPA's assumptions, including the opportunity to appeal the resulting decision to the Federal Energy Regulatory Commission.

Finally, the decision of the Ninth Circuit in this case especially warrants this Court's attention and supervision because the Ninth Circuit is the court of first resort in cases involving BPA action under the Pacific Northwest Power Planning Act [16 U.S.C. § 839f(e)(5)], and therefore this Court is the only court of appeal where the Ninth Circuit errs. For this reason, it is likely that this Court will continue to face arguments in future cases that BPA is or is not justified in some action it takes that is not consistent with its statutory mandate because the facts and circumstances of those future cases are or are not sufficiently "unusual" to justify departure from the rules Congress has enacted. Since the Ninth Circuit has provided little, if any, guidance to BPA as to when it must obey those rules and when it may ignore them, it is reasonable to anticipate that this case will spawn unnecessary and counter-productive future litigation as parties attempt to test the limits of this new, ill-advised, and illegal doctrine. This waste of judicial resources can and should be avoided through reversal of the decision by this Court.

CONCLUSION

Judge Norris, in dissent, has well-characterized the path the majority took in this case as "starting down the road of reviewing BPA power sales under a vague 'unusual circumstances' exception to the clear and unequivocal congressional command that BPA must follow prescribed ratemaking procedures in selling power." 754 F.2d at 1485. Judge Norris is equally accurate in his observation that "[w]hether BPA should have greater flexibility in ratemaking is a question that should be decided by the Congress, not [the Ninth Circuit]." *Id.* The Court should reverse the majority opinion because it constitutes unconstitutional infringement on the legislative powers of Congress, because it will likely serve as a precedent that will lead BPA and other Ninth Circuit panels into error in future cases, and because it may generate unnecessary and wasteful litigation as parties attempt to obtain further definition of the newly created judicial doctrine of "unusual circumstances."

Respectfully submitted,

William M. Chamberlain
General Counsel
California Energy Commission
1516 Ninth Street MS-14
Sacramento, California 95814
Telephone: (916) 324-3237
Attorney for Petitioner

APPENDIX

APPENDIX

MAJORITY OPINION OF THE NINTH CIRCUIT

CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, Petitioner.

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent.
No. 83-7181.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 3, 1984.
Submission Withdrawn July 11, 1984.
Resubmitted Oct. 2, 1984.
Decided March 4, 1985.

Before KILKENNY, SNEED, and NORRIS, Circuit Judges.

Sneed, Circuit Judge:

Petitioner California Energy Resources Conservation and Development Commission (CEC) challenges transactions between the Bonneville Power Administration (BPA) and two northwest electric utilities that took place in 1983. Petitioner seeks a declaratory judgment that the transactions constituted a sale of electric power by BPA at a rate below that authorized by the established rate structure, and that BPA was therefore required to undertake statutorily-mandated ratemaking proceedings before entering into the transactions.

We find that, under the circumstances of this case, BPA was not required to follow ratemaking procedures. We therefore deny petitioner's request for a declaratory judgment.

I.

STATEMENT OF THE CASE

A. *Background*

Respondent BPA is a federal government agency that markets power from hydroelectric projects and other federally-owned sources of electric power in the Pacific Northwest. BPA's operations are governed by the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839–839h (1982) (the Regional Act). The Regional Act requires BPA to set rates that cover its costs and also return the federal investment in BPA's facilities "over a reasonable period of years," *Id.* § 839e(a)(1). The Act prescribes procedures for setting and modifying rates. The procedures include notice in the Federal Register, hearings, and decision on the record. *See id.* § 839e(i). Rates must be approved by the Federal Energy Regulatory Commission (FERC) before they become effective. *Id.* § 839e(a)(2). Rate determinations and other final agency actions are subject to judicial review in this court. *See id.* § 839f(e).

Petitioner CEC is an agency of the State of California responsible for formulation and implementation of energy policies. *See* Cal.Pub.Res.Code §§ 25200, 25216. CEC is interested in BPA rates and the availability of BPA power because California electric utilities purchase a substantial amount of power from BPA.

This case, like the accompanying case of *Portland General Electric Co. v. Johnson,* 754 F.2d 1475 (9th Cir.1985), arises from the BPA's efforts to market surplus electric power during a period of unexpectedly high supply and unexpectedly low demand. *Portland General Electric* contains a more detailed explanation of the surrounding circumstances. Briefly, at the beginning of 1983, BPA found itself with a large surplus of

marketable electric power and a severe shortfall in revenues. Abnormally high stream flows were filling BPA's reservoirs to capacity, but sales were off due to a downturn in the national and regional economies. If BPA could not find ways of increasing its sales, it faced the prospect of spilling water over its dams without utilizing the energy that that water could produce, while having to defer interest and amortization payments to the United States Treasury.

The Trojan nuclear power plant (Trojan) is jointly owned by BPA, the Portland General Electric Company (PGE), and the Pacific Power & Light Company (PP & L). BPA owns 30 percent of the plant, PGE owns 67.5 percent, and PP & L owns 2.5 percent. Trojan produces electric power at an average variable cost of approximately 0.6 cents per kilowatt-hour.

B. *The Challenged Transactions*

With BPA's reservoirs projected to soon be in a "spill" condition, its marginal cost for producing hydroelectric power in 1983 was much lower than the 0.6 cents per kilowatt-hour that it cost to run Trojan. Additional hydroelectric power was virtually free; it represented the utilization of energy that would otherwise be lost. Therefore, simple economics mandated that Trojan be shut down and the power that it produced be replaced with hydroelectric power from BPA. Such a shutdown and replacement would generate savings for all of Trojan's owners, as well as additional revenues for BPA.

Significant cost savings could only be achieved if Trojan were shut down completely. Simply reducing its output would not produce savings proportional to the reduction. Therefore, for the savings to be achieved, PGE and PP & L, as well as BPA, would have to replace their power from Trojan with hydroelectric power from BPA's dams.

For BPA, replacing its 30 percent share of the Trojan output with hydroelectric power was a purely internal matter, but for PGE and PP & L the replacement required a purchase of power from BPA at BPA's rates. BPA's rate schedule then in effect, however, did not reflect its extremely low marginal cost of producing power under spill conditions. Although the schedule contained a rate that applied specifically to short-term sales under spill conditions, that rate was 0.9 cents per kilowatt-hour, greater than the cost of running Trojan. At that rate, PGE and PP & L would obviously be unwilling to replace Trojan's output with BPA power. The shutdown could therefore be arranged only if the cost of BPA power to PGE and PP & L could be reduced.

BPA met this problem by arranging to purchase from PGE and PP & L their "scheduling rights" to Trojan for the period January 21–April 30, 1983. The purchase of the scheduling rights enabled BPA to shut down Trojan, thereby requiring PGE and PP & L to purchase power from BPA. The purchase price for the scheduling rights was set at 13.1 million dollars. The cost to PGE and PP & L of replacement power from BPA at 0.9 cents per kilowatt-hour was 15.5 million dollars. Therefore, the net cost to PGE and PP & L was only 2.4 million dollars, or approximately fifteen percent of the nominal 15.5 million-dollar cost of replacement power. Thus, the average net price for the replacement power was approximately 0.14 cents per kilowatt-hour (fifteen percent of the nominal 0.9-cent rate), compared to the 0.6-cent cost of running Trojan. At that rate, PGE and PP & L saved money from the Trojan shutdown, but BPA still profitted from the transactions because its cost of generating the replacement power was near zero.

During the shutdown, BPA initiated procedures for

the formulation of new rates. *See* 48 Fed.Reg. 4027 (1983); 48 Fed.Reg. 12,777 (1983). The proposed new rates included a special "nuclear displacement" rate of 0.3 cents per kilowatt-hour, applicable to situations such as that that led to the challenged transactions. *See* Bonneville Power Administration, U.S. Dept. of Energy, Administrator's Record of Decision, 1983 Final Rate Proposal, at D-45 (Sept. 1983). The nuclear displacement rate was designed to make ad hoc arrangements such as BPA's purchase of Trojan scheduling rights unnecessary, but, because of the lengthy ratemaking process, the new rates were not scheduled to go into effect until November 1, 1983, six months after the end of the Trojan shutdown.

C. *CEC's Objections*

CEC objects to the transactions relating to the Trojan shutdown on the grounds that they constituted a modification of BPA's rate structure without adherence to ratemaking procedures mandated by the Regional Act. As already mentioned, CEC seeks a declaratory judgment that the transactions are unlawful.

BPA responds that the case is moot, that CEC lacks standing to bring this action, and that, on the merits, the transactions were lawful because the replacement power was sold to PGE and PP & L at the established 0.9-cent rate, and BPA's purchase of the Trojan scheduling rights was within BPA's contracting authority under the Regional Act. We shall address each of these contentions in turn.

II.

DISCUSSION

A. *Mootness*

[1] BPA argues that this case is moot because the challenged contracts have all been performed and terminated. We disagree, and we hold that this case is not moot, because the challenged transaction is of a type that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). As demonstrated by *Portland General Electric,* short-term transactions such as these before us can evade review in the sense that they can be completed in a shorter time than that required by the parties and this court to file, brief, argue, and decide a case. That is all that the concept "ability to evade review" signifies. It does not signify an ability to evade review indefinitely. To find that an issue is "capable of repetition yet evading review" embodies the conclusion that review, albeit somewhat belated, is now possible. That precisely is our conclusion in this case.

BPA also argues that the transactions that gave rise to this action will not be repeated because the "nuclear displacement" rate will make them unnecessary. We agree with CEC, however, that BPA characterizes too narrowly the type of action concerned. As this court stated in *Williams v. Alioto,* 549 F.2d 136 (9th Cir. 1977), "[t]he repetition/evasion exception does not require a repetition of the exact law or behavior. The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur." *Id.* at 143 n. 8. Although the nuclear displacement rate may solve the problem of facilitating nuclear reactor shutdowns, it will not eliminate the incentive for other short-term special

arrangements designed to market surplus power at reduced prices in times of slack demand. Any such short term arrangements will raise the same issues raised in this case, and all such arrangements will tend to evade review because of their short-term nature. We therefore find that this case is not moot because it is "capable of repetition, yet evading review."

B. *Standing*

BPA's challenge to CEC's standing to bring this action also fails.

[2] CEC, as an agency responsible for energy planning in a state that purchases substantial amounts of energy from BPA, clearly represents interests that are affected by BPA's rate structure. For this reason, CEC was permitted to participate in BPA's 1982 and 1983 ratemaking proceedings as "a party representing a significant and otherwise unrepresented interest." *See* BPA regulations § 1010.2(f)(2), 47 Fed.Reg. 6240, 6243 (1982). CEC alleges that BPA has modified its rates without adherence to the statutorily-mandated ratemaking procedures. We must accept this allegation as true for the threshold purpose of determining whether CEC has standing. Because CEC has a legally cognizable interest in participating in BPA's ratemaking procedures, then clearly it must have standing to challenge any alleged departures from those procedures that impinges on its interests. Without a right to challenge an alleged failure to follow required procedures, the right to participate in such procedures could be rendered meaningless. We therefore reject the contention that CEC has no standing to bring this action.

C. *The Merits*

[3] Both CEC and BPA address the merits of this case as a question of the appropriate characterization of

BPA's actions. CEC sees these actions as a single transaction. It alleges that BPA sold energy to PGE and PP & L at 0.15 cents per kilowatt-hour, a rate unauthorized by the existing rate schedule and therefore unlawful unless established in new ratemaking proceedings. BPA responds that it engaged in two separate transactions: (1) a purchase of scheduling rights to the Trojan reactor, and (2) a sale of energy at the established spill rate of 0.9 cents per kilowatt-hour. Although we believe that CEC's characterization is nearer the mark, we find that, under the unusual circumstances of this case, BPA was not required to follow ratemaking procedures.

We find BPA's characterization less persuasive because the purchase of Trojan scheduling rights was inextricably linked to the sale of energy to PGE and PP & L. The rights to Trojan power were, by themselves, virtually worthless to BPA. Indeed, the entire set of transactions was motivated by the circumstance that BPA already had more power than it could sell. BPA does not, and could not, contend that those rights themselves were worth the thirteen million dollars that BPA paid for them. In exchange for BPA's thirteen million dollar payment to PGE and PP & L, BPA obtained PGE and PP & L's commitment to purchase fifteen million dollars worth of energy from BPA. In other words, BPA paid PGE and PP & L to purchase power from it. But paying the buyer to buy is the same thing as reducing the price the buyer must pay. We therefore accept CEC's characterization of the transaction as a sale of energy at a reduced rate that ordinarly would require modification of the rate schedule through the statutory ratemaking procedures.

This conclusion is not dispositive of the case, however. As in *Portland General Electric,* we find that the unusual circumstances of this case justified BPA's short-term

departure from normal ratemaking procedures. Those circumstances required BPA "to mold its procedures to the exigencies of the particular case." *Gulf States Utilities Co. v. Federal Power Comm'n,* 411 U.S. 747, 762, 93 S.Ct. 1870, 1879, 36 L.Ed.2d 635 (1973). As in *Portland General Electric,* we are influenced by the extraordinary conditions that led BPA to act, by the need for prompt action by BPA, by the short-term, interim nature of the transactions, and especially by the fact that the transactions were voluntary on the part of the participants and had no adverse effect on any of BPA's customers.[1] Had not BPA arranged with PGE and PP & L to shut down the Trojan reactor, that reactor would have burned costly nuclear fuel at the same time that BPA, by spilling water over its dams, would have lost the energy and the revenues that the water could have produced. No one would have benefitted from such economic waste. In contrast, the sale of energy by BPA to replace the power from the Trojan reactor produced revenues that helped BPA meet its obligations to the United States Treasury, and potentially reduced the rate burden on BPA's other customers.

At the time of the shutdown, BPA was engaged in ratemaking proceedings that would build into its rate structure a permanent provision for this type of situation. But without interim action, millions of dollars in revenue would have been lost and millions of dollars worth of nuclear fuel wasted before those new rates

[1] The Federal Energy Regulatory Commission, which has responsibility for approving BPA's rate determinations, also is of the opinion that BPA was not required to undertake ratemaking proceedings or seek approval from FERC before entering into the challenged transactions. *See* Brief *amicus curiae* for Federal Energy Regulatory Commission. FERC, however, bases its conclusion on different grounds than those we rely on.

went into effect. Quite naturally, then, BPA sought to work out a short-term arrangement that would avoid waste and preserve revenues until the new rates went into effect. The shutdown arrangements lasted for only three months, and were terminated before the new rates went into effect.

Finally, and most importantly, the challenged transactions did not cause any harm to any of BPA's customers, including the California utilities that are of particular concern to CEC. The transactions affected only the two utilities that voluntarily participated in them. During and after the Trojan shutdown, BPA power continued to be available to all of BPA's customers at the rates, and according to the availability provisions, established in full ratemaking proceedings.

In general, CEC accepts these conclusions. Its concern is that BPA's action may set a precedent for future impromptu rate revisions that may affect California. CEC's fear is unfounded for two reasons. First, our decision in this case does not constitute a general approval of impromptu rate modifications by BPA. Our decision is based on the particular and unusual circumstances of this case. While we cannot say that circumstances justifying similar action by BPA will never recur, we do not expect such rate modification action will become a regular feature of BPA's operations. Statutory ratemaking procedures will remain the primary mechanism for modifications of BPA's rates. Second, our decision in this case relies on the fact that PGE and PP & L voluntarily participated in the transactions. A unilateral modification, even one that prevented economic waste, would stand on entirely different ground.

Judgment for Respondent.

NORRIS, Circuit Judge, dissenting:

I dissent for the reasons stated in my dissenting opinion in the companion case of *Portland General Electric Co. v. Johnson,* 754 F.2d 1475 (9th Cir.1985).

Dissenting Opinion of Judge Norris

Congress has carefully circumscribed the statutory authority of the Bonneville Power Administration ("BPA") to sell hydroelectric power in the Pacific Northwest by requiring BPA to follow detailed procedures in establishing rates. 16 U.S.C. § 839e(i). In this case it is undisputed that BPA sold surplus hydroelectric power to aluminum manufacturers, referred to as direct service industrial customers ("DSI's"), at rates not established in conformity with the statutory procedures.

Portland General Electric Company ("PGE") challenges the sales to the DSI's because the statutory ratemaking procedures were not followed. The majority excuses BPA's failure to conform to the statutory ratemaking procedures because of what the majority considers to be the "unusual circumstances" of the case.

Thus, the majority carves out an "unusual circumstances" exception to the absolute statutory command that "in establishing rates . . . the Administrator shall use the following procedures . . ." 16 U.S.C. 839e(i).[1]

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[1] Judge Sneed, in interpreting the statute to create an "unusual circumstances" exception, does not rely upon the rule that a statutory interpretation made by an administrator of an agency is entitled to special deference. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* —— U.S.——, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). This lack of deference is not surprising because Judge Sneed's theory was not advanced by any of the party's involved in this appeal. BPA simply argued that the statutory ratemaking procedures were inapplicable because the sales to the DSI's did not involve ratemaking. Curiously, the Federal Energy Regulatory Commission ("FERC"), in its amicus brief, argues still a different theory for validating the sales: The transactions should not be subject to ratemaking procedures because they were changes in rate schedules rather than in the rates. Brief Amicus Curiae of FERC at 6.

I submit that the majority's statutory exception is created out of whole judicial cloth. It finds no support either in the statutory language or legislative history. Indeed, Judge Sneed cites no language in the statute that he relies upon, nor does he cite any legislative history to support his "unusual circumstances" exception. The consequence of this judicially fashioned exception is to confer upon the BPA undefined discretion to bypass the statutory ratemaking procedures whenever it considers it expedient to do so. The only check on the BPA's discretion is review by this court under the majority's vague "unusual circumstances" standard.

In this case, the majority has determined that "unusual circumstances" justified the sales to the DSI's at rates not adopted pursuant to the ratemaking procedures because of a substantial surplus of power created by a combination of abnormally high stream flows and reduced demand for power resulting from a recession. The majority reasons that under these circumstances, BPA's decision to sell nonfirm energy to DSI's without following the ratemaking procedures appears to have made good economic sense.

On the face of it, the majority's reasoning is seductive. There is considerable appeal in the argument that by selling the nonfirm energy to DSI's at bargain rates the BPA would succeed in both reducing the surplus of hydroelectric power and stimulating the depressed economy of the Pacific Northwest by inducing aluminum companies to increase production. The Congress, however, has not given this court the authority to ratify sales of power by BPA in contravention of the statutory ratemaking procedures on the basis of our judgment

that the sales made good business sense under the circumstances. Moreover, if this court is to review BPA's business judgment as though we were a board of directors reviewing management decisions, we should have an evidentiary record before us. Here there is nothing except BPA's word that it thought the sale of power to DSI's seemed to be a good idea. There is no testimony. There are no documents. There are no opinions of experts agreeing or disagreeing with BPA. For all we know from this record, the disputed sales were nothing more than a windfall to the aluminum companies at the expense of other BPA customers such as PGE. For all we know, the twin goals of disposing of surplus power and stimulating the economy of the Pacific Northwest would have been achieved more effectively and equitably if the surplus power had been offered at reduced rates to all BPA customers, not just the DSI's. The point is that the majority's opinion that the sales to the DSI's made good economic sense is based on nothing but surmise.

I believe that we are remiss in starting down the road of reviewing BPA power sales under a vague "unusual circumstances" exception to the clear and unequivocal congressional command that BPA must follow prescribed ratemaking procedures in selling power. Whether BPA should have greater flexibility in ratemaking is a question that should be decided by the Congress, not this court. Indeed, Congress has created at least one exception to the ratemaking procedural requirements by giving BPA the flexibility to sell power outside the United States at negotiated rates above rates established in ratemaking procedures for nonfirm power sold domestically. 16 U.S.C. § 839e(1). Perhaps BPA should have similar flexibility when confronted with an exceptional surplus of power such as existed in the spring of 1983. But once again, that is for Congress, not this court to decide.

TROJAN SHUT-DOWN CONTRACTS

Department of Energy
Bonneville Power Administration
Office of the Administrator
P.O. Box 3621
Portland, Oregon 97208 February 3, 1983
In reply refer to: PKI Contract No.
DE-MS79-83BP91124

Mr. Glen E. Bredemeier, Vice President
Portland General Electric Company
121 SW. Salmon Street
Portland, Oregon 97204

Dear Mr. Bredemeier:

This letter confirms arrangements discussed by the staffs of Bonneville Power Administration (Bonneville) and Portland General Electric Company (PGE) concerning the early shutdown of the Trojan nuclear plant in response to the current regionwide power surplus. The parties will not consider this early shutdown of Trojan to affect deliveries of energy by PGE to California entities.

Accordingly, Bonneville proposes the following terms and conditions:

1. *Term.* This agreement shall be effective at 2400 hours on January 21, 1983, and shall continue in effect until 2400 hours on April 30, 1983, but all liabilities accrued hereunder shall be preserved until satisfied.

2. *Exhibits.* Wholesale Nonfirm Energy Rate Schedule NF-2 and General Rate Schedule Provisions (Exhibit A), and Provisions Required by Statute or Executive Order (Exhibit B) are hereby made a part of this agreement.

3. *Scheduling Rights.* Bonneville shall pay PGE $12,-

650,000 for the right to schedule the PGE share of the full output of the Trojan nuclear plant during the term of this agreement.

4. *Trojan Shutdown Energy*

(a) Pursuant to Exhibit A (Rate Schedule NF-2), Bonneville shall deliver and PGE shall pay for energy in an amount equivalent to the PGE share of the planned output of the Trojan nuclear plant during the term of this agreement (700 average megawatts for 99 days, a total of 1,662,500 megawatt-hours).

(b) In accordance with Exhibit A, Bonneville may restrict delivery of energy to PGE when operation of generation or transmission facilities used by Bonneville to serve PGE is suspended, interrupted, interfered with, or restricted as the result of the occurrence of any condition described in the Uncontrollable Forces or Continuity of Service provisions of Contract No. 14-03-37017 (Exchange Agreement) with Bonneville.

(c) Energy will be delivered to PGE at Points of Delivery as described in its Exchange Agreement with Bonneville. Delivery and scheduling arrangements for energy under this agreement shall be subject to the appropriate provisions of such agreement.

5. *Payment*

(a) PGE shall pay Bonneville for deliveries of energy in accordance with the payment provisions of Exhibit A.

(b) Bonneville shall make cash payment to PGE in consideration for the provisions of section 3 in three equal amounts by March 25, April 25, and May 25, 1983.

Please indicate your agreement to the above terms and conditions by signing one copy of this letter in the space provided and returning it to Bonneville. The remaining copy is for your files. Bonneville will prepare and deliver to you a certified, conformed, composite copy of this agreement after its has been executed.

Sincerely,
Peter Johnson
Administrator

ACCEPTED:
PORTLAND GENERAL ELECTRIC COMPANY
By: Glen E. Bredemeier
Title: Vice President
Date: February 8, 1983

SCHEDULE NF-2—NONFIRM ENERGY RATE

SECTION 1. *Availability:*

This schedule is available for the contract purchase of nonfirm energy both inside and outside the Pacific Northwest and outside the United States. This schedule is also available for energy delivered for emergency use under the conditions set forth in Section 4.1 of the General Rate Schedule Provisions. This schedule is not available for the purchase of energy which BPA has a firm obligation to supply. This schedule supersedes Schedule NF-1 which went into effect on an interim basis on July 1, 1981.

SECTION 2. *Rate:*

a. *Nonfirm Energy Rate:* The price per kilowatthour of billing energy will be set according to the following three conditions. More than one condition may apply at any given time.

(1) *Standard Rate:* This rate shall apply when the Federal Columbia River Power System (FCRPS) hydroelectric plants are not in a spill or imminent spill condition due to an excess of energy on the FCRPS above available markets. The rate shall be 18.2 mills per kilowatthour. At the time BPA offers nonfirm energy under this rate, BPA will indicate the maximum amount of energy available for the next day or days over which nonfirm is normally prescheduled in the Pacific Northwest and the maximum hourly rates at which such energy is available. BPA shall offer 50 percent of the maximum amount of energy and 50 percent of each maximum hourly amount on a guaranteed delivery basis. At the time the purchaser arranges schedules of such energy, it shall indicate the

amount it wishes to schedule on a guaranteed delivery basis and the amount it wishes to schedule on a nonguaranteed delivery basis. The energy BPA makes available under this rate for delivery the same day is not subject to the guaranteed delivery provision. BPA shall offer nonfirm energy for sale under this standard rate and the purchaser shall schedule the delivery of such energy in accordance with the scheduling provisions of the purchaser's power sale agreement with BPA. To the extent BPA offers and the purchaser schedules delivery on a guaranteed delivery basis, scheduled amounts may not be changed except when:

(a) BPA and the Purchaser mutually agree to increase or decrease the scheduled amounts, or

(b) BPA must reduce nonfirm energy deliveries in order to serve firm loads because of unexpected generation loss in the Pacific Northwest.

(2) *Spill Rate:* When a spill or imminent spill condition exists at one or more FCRPS hydroelectric plants due to an excess of energy on the FCRPS above available markets, the rate shall be 9.0 mills per kilowatthour.

(3) *Incremental Rate:* For power (a) which is produced or purchased concurrently with the nonfirm sale, (b) which BPA may at its option not produce or purchase, and (c) whose incremental cost is greater than 16.2 mills per kilowatthour; the rate shall be equal to the incremental cost of that power plus 2.0 mills per kilowatthour. Incremental cost is defined

as all identifiable costs in mills per kilowatthour which BPA would not have incurred if it had chosen not to produce or purchase the power being sold under this rate.

b. *Contract Rate:* For contracts that refer to this schedule to determine the value of energy, the rate is 11.2 mills per kilowatthour.

SECTION 3. *Delivery:*

BPA shall determine the availability of energy hereunder and the rate of delivery thereof.

SECTION 4. *Resource Cost Contribution:*

The approximate cost contribution of different resource categories to the NF-2 standard rate is 96.7 percent FBS and 3.3 percent New Resources.

The forecasted average cost of resources available to the Administrator under average water conditions is 16.6 mills per kilowatthour.

The forecasted cost of resources to meet load growth is 28.0 mills per kilowatthour after displacement by BPA's available secondary energy.

SECTION 5. *General Provisions:*

Sales of energy under this schedule shall be subject to the General Rate Schedule Provisions and the following Acts, as amended: the Bonneville Project Act, the Regional Preference Act (Pub. L. 88-552), the Federal Columbia River Transmission System Act, and the Pacific Northwest Electric Power Planning and Conservation Act.

ADDITIONAL MATERIAL OMITTED

Department of Energy
Bonneville Power Administration
Office of the Administrator
P.O. Box 3621
Portland, Oregon 97208

February 3, 1983

In reply refer to: PKI

Contract No.
DE-MS79-83BP91125

Mr. R. B. Lisbakken
Vice President, Power Resources
Pacific Power & Light Company
920 SW. Sixth Avenue
Portland, Oregon 97204

Dear Mr. Lisbakken:

This letter confirms arrangements discussed by the staffs of Bonneville Power Administration (Bonneville) and Pacific Power & Light Company (PP&L) concerning the early shutdown of the Trojan nuclear plant in response to the current regionwide power surplus.

Accordingly, Bonneville proposes the following terms and conditions:

1. *Term.* This agreement shall be effective at 2400 hours on January 21, 1983, and shall continue in effect until 2400 hours on April 30, 1983, but all liabilities accrued hereunder shall be preserved until satisfied.

2. *Exhibits.* Wholesale Nonfirm Energy Rate Schedule NF-2 and General Rate Schedule Provisions (Exhibit A), and Provisions Required by Statute or Executive Order (Exhibit B) are hereby made a part of this agreement.

3. *Scheduling Rights.* Bonneville shall pay PP&L $451,785.70 for the right to schedule the PP&L share of the full output of the Trojan nuclear plant during the term of this agreement.

4. *Trojan Shutdown Energy*

(a) Pursuant to Exhibit A (Rate Schedule NF-2), Bonneville shall deliver and PP&L shall pay for energy in an amount equivalent to the PP&L share of the planned output of the Trojan nuclear plant during the term of this agreement (25 average megawatts for 99 days, a total of 59,375 megawatt-hours).

(b) In accordance with Exhibit A, Bonneville may restrict delivery of energy to PP&L when operation of generation or transmission facilities used by Bonneville to serve PGE is suspended, interrupted, interfered with, or restricted as the result of the occurrence of any condition described in the Uncontrollable Forces or Continuity of Service provisions of Contract No. 14-03-29245 (Exchange Agreement) with Bonneville.

(c) Energy will be delivered to PP&L at Points of Delivery as described in its Exchange Agreement with Bonneville. Delivery and scheduling arrangements for energy under this agreement shall be subject to the appropriate provisions of such agreement.

5. *Payment*

(a) PP&L shall pay Bonneville for deliveries of energy in accordance with the payment provisions of Exhibit A.

(b) Bonneville shall make cash payment to PP&L in consideration for the provisions of section 3 in three equal amounts by March 25, April 25, and May 25, 1983.

Please indicate your agreement to the above terms and conditions by signing one copy of this letter in the space provided and returning it to Bonneville. The remaining

copy is for your files. Bonneville will prepare and deliver to you a certified, conformed, composite copy of this agreement after it has been executed.

Sincerely,
Peter Johnson
Administrator

ACCEPTED:
PACIFIC POWER & LIGHT COMPANY
By: R. B. Lisbakken
Title: Vice President
Date: February 8, 1983

EXHIBITS OMITTED